DIABLO COMMUNICATIONS, INC.

IBLA 92-611 Decided March 11, 1994

Appeal from a decision of the Acting Area Manager, Caliente Resource Area, California, Bureau of Land Management, requiring payment of estimated processing fees for communications site right-of-way application CA-30523.

Affirmed in part, set aside in part and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

   The Board will not overturn a BLM determination of reimbursable costs expected to be incurred while administering a right-of-way application if the cost estimate is supported by the record and the applicant has failed to demonstrate otherwise.

APPEARANCES: Robert H. Sexton, Site Acquisition Consultant, Diablo Communications, Inc., Point Richmond, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Diablo Communications, Inc. (Diablo), has appealed from an August 5, 1992, decision of the Acting Area Manager, Caliente Resource Area, California, Bureau of Land Management (BLM), requiring payment of $12,031 in estimated processing fees for communications site right-of-way application CA-30523.

On July 9, 1992, Diablo submitted an application seeking a 30-year right-of-way for a communications site atop Midway Peak and associated access over an existing road, all in Kern and San Luis Obispo counties, California. The right-of-way would encompass 6 acres of public land in sec. 35, T. 31 S., R. 22 E., and secs. 2 through 4, T. 32 S., R. 22 E., Mount Diablo Meridian. The communications facility would consist of an 8- by 20- by 8-foot prefabricated building on a concrete-and-steel pier structure constructed on a graded site and an 180-foot guyed and cross-braced tubular steel-legged tower. In order to accommodate the building and tower, Diablo proposed to reroute a fence that crossed the proposed site. Diablo also sought a 30- by 60-foot staging area. The application was filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1761 (1988).

The August 1992 decision notified Diablo that it was required to fully reimburse BLM in advance for all anticipated reasonable costs that would be incurred in processing the right-of-way application, which had

been determined to fall into "Category V." The decision found that Category V applications were those that required "gathering [a] substantial amount of original data and three or more field examinations" to comply with the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. §§ 4321-4370a (1988). The decision explained:

> A preliminary review of your application indicates there are a number of resource concerns that will need to be addressed in our environmental assessment [EA] and processing of your application, including: potential impacts to the California condor [Gymnogyps californianus], a Federally-listed species; coordination with existing grazing operators to address your proposed fence relocation; impacts to visual resources; as well as the need for an appraisal for rental determination.

(Decision at 1-2). It was stated that BLM had estimated processing costs at $12,031 and that Diablo was required to make an initial payment of $875, with additional payments to be made quarterly thereafter. Diablo appealed from the August 1992 decision.

On appeal, Diablo contends that the application category should be changed to "Category II." Diablo disputes BLM's Category V determination, arguing first that BLM need not assess the potential impact of issuing the right-of-way grant on the California condor where there are no known condors in the wild and, even if there were, BLM should have all necessary and relevant information already in its files since a right-of-way grant for a communications site on Midway Peak was previously issued. Diablo states that only a single site visit to verify existing information should be required. Diablo also argues that BLM need not appraise the site for purposes of determining the proper rental since Diablo offers to pay a fixed percentage of gross revenues generated by its communications facility (either 15 or 20 percent, depending on whether all "necessary support systems" are in place). Now, on appeal, Diablo has retracted the proposal to relocate the existing fence, excepting only a right to place a guy wire outside it. By this change, it is argued that BLM need not spend any time on this item. While Diablo recognizes that the impact on visual resources needs to be evaluated, nonetheless pursuit of this inquiry is considered to be feasible using existing information and a single site visit.

[1] Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1988), authorizes the Secretary of the Interior to require an applicant for a right-of-way grant over public lands to, as a condition of receiving the grant, "reimburse the United States for all reasonable administrative and other costs incurred in processing an application." See Joe B. Kearl, 119 IBLA 122, 123 (1991); Earl M. Hardy, 113 IBLA 367, 374 (1990); Smart & Co., 79 IBLA 323, 327 (1984); Wyoming Water, Inc., 56 IBLA 139, 141 (1981). Such reimbursement is now required by 43 CFR 2808.1(a), a regulation providing that payment be made before the United States has incurred any costs. See also 43 CFR 2808.2-2(a); Smart & Co., supra at 327-28. To determine the appropriate charge, the Department provides for placing right-of-way applications in one of five categories, depending on the amount of administrative work anticipated. The categories range from I (where processing the

application is expected to involve review of available data and no field examination), to V (where processing will include gathering original data and three or more field examinations). See 43 CFR 2808.2-1(a). The fees range from $125 to whatever is required to reimburse BLM. See 43 CFR 2808.3-1(a).

BLM found that Diablo's right-of-way application fell into Category V. Proceeding under 43 CFR 2808.3-1(c), BLM then determined, prior to issuing the August 1992 decision, that a total of 2.8 work-months would be spent by 12 employees, including 9 resource and technical specialists and the area and district managers, to handle Diablo's application. BLM anticipated that 1 work-month would be used by a realty specialist to conduct a field examination, prepare an EA, and coordinate review by other BLM employees specializing in botany, zoology, archaeology, visual resource management and recreation, and grazing. These other specialists were expected to use from 0.10 to 0.25 work-months to make field examinations and gather data for the EA. In addition, the right-of-way application would be reviewed by specialists in electronics and engineering (0.10 work-months each) and an appraisal would be made to determine fair market rental (0.5 work-months). All of this, according to BLM, translates to $9,800 in "[p]ersonnel" costs (Financial Plan). BLM also estimated there would be four trips, incurring costs (at $0.20/mile) of $96. Finally, $300 was allocated for procurement of equipment and supplies and $1,835.28 to "[i]ndirect" costs. Id. The total was rounded to $12,031. Most of these costs necessarily go to assessment of the environmental impact of right-of-way issuance. See 43 CFR 2802.4(d). This assessment is required to fulfill a statutory obligation under section 102 of NEPA, as amended, 42 U.S.C. § 4332 (1988), by determining whether issuance of the right-of-way grant constitutes a major
Federal action that will significantly affect the quality of the human environment. See 40 CFR 1501.4; e.g., Southern Utah Wilderness Alliance, 122 IBLA 165, 168 (1992).

Included among those costs for which the United States is entitled
to full reimbursement are those involved in the preparation of a "report" pursuant to NEPA (43 CFR 2808.1(a)). Diablo suggests that, while a report should be prepared, no additional collection of data need be undertaken aside from one site visit to verify existing information. See Statement
of Reasons (SOR) at 1. This would place the application in Category II. See 43 CFR 2808.2-1(a)(2). It is apparent from the record that there was, at the time Diablo submitted its application, an existing communications site right-of-way granted by BLM on Midway Peak. Following preparation of an EA in January 1983, a right-of-way (CA-12912) was issued to Aitken Communications, Inc. It is therefore undoubtedly correct that BLM should have some information regarding conditions on the mountaintop. But Diablo has presented no evidence that BLM has "all [the] environmental information needed [for assessing the anticipated environmental impacts of issuance
of the subject right-of-way grant]," whether that concerns potential impact to the California condor or all other impacts (SOR at 1 (emphasis added)). Nor is that likely to be the case. There is nothing to suggest that the sites are identical in terms of all botanical, wildlife, archaeological, and visual resources. Nor can BLM justifiably assume that to be the case without examination of the proposed location. Over 10 years have passed

since preparation of the EA for right-of-way grant CA-12912. Conditions on the mountaintop may have changed in that time, so that we cannot rule out the need for BLM specialists to examine the proposed site in order to determine anticipated environmental impacts from construction of the communications facility at that site, where there is no evidence that BLM has ever assessed those impacts. To fail to do so would violate NEPA. Therefore, we are persuaded that the record supports the conclusion that BLM's processing of the subject application will entail the "gathering of original data [in order to comply with NEPA] * * * and 3 or more field examinations" (43 CFR 2808.2-1(a)(5)); Diablo has failed to demonstrate otherwise. See Northwest Pipeline Corp., 99 IBLA 364, 367-68 (1987).
This places the application in Category V, requiring that Diablo reimburse BLM for the processing costs found owing. 43 CFR 2808.2-2(a) and 2808.3-1(a).

Diablo also contends that BLM need not undertake an appraisal of the proposed right-of-way grant because Diablo will agree at the outset to base rental payment on a percentage of gross revenues. The holder of a right-of-way is required by section 504(g) of FLPMA to pay the "fair market value" of the right-of-way (43 U.S.C. § 1764(g) (1988)). See also 43 CFR 2803.1-2(a). Rental is required to be determined by BLM, based on "either a market survey of comparable rentals * * * or * * * a value determination for [a] specific parcel[]." 43 CFR 2803.1-2(c)(3)(i). This regulation does not bar BLM from adopting a percentage of gross revenues formula for determining the appropriate rental. See Laguna Gatuna, Inc., 121 IBLA 302, 307 (1991) (rental paid for salt water disposal site right-of-way based on price per barrel); Earl M. Hardy, supra at 370-71 (rental paid for water diversion and flume right-of-way based on price per volume of water). Nonetheless, under section 504(g) of FLPMA BLM must determine whether the rental it adopts constitutes fair market value for the right-of-way. See, e.g., Voice Ministries of Farmington, Inc., 124 IBLA 358, 361 (1992). That action cannot be accomplished by unquestioned acceptance of the formula proposed by Diablo. At the very least, BLM must determine whether that formula achieves fair market value; in other words, it must appraise the subject right-of-way grant. Therefore, we conclude that BLM properly included the cost of an appraisal in the administrative costs that will be incurred in processing Diablo's right-of-way application. Earl M. Hardy, supra at 374.

Finally, Diablo has made no effort to refute BLM findings concerning the expected number of work-months that will be consumed by its employees in processing Diablo's right-of-way application, nor has it challenged the computation of estimated costs that will be incurred in this process.
Further, Diablo has not shown that any of these costs are unreasonable under section 304(b) of FLPMA, 43 U.S.C. § 1734(b) (1988). See 43 CFR 2808.3-1(e). Nor can we find any error in those computations. Therefore, we conclude that BLM properly computed total expected reimbursable costs.

Since BLM estimated those costs, however, Diablo has amended its right-of-way application by deleting the proposal to relocate an existing fence that crosses the proposed communications site and marks the boundary of public lands subject to a grazing lease. Relocation of the

fence could have affected the grazing lessee by removing some land from his use. As a consequence of this change it is possible that the expected work of the BLM grazing specialists and other employees may be less than projected. Because of this change, we will give BLM an opportunity on remand to revise (or affirm) its estimate of the anticipated work that will be devoted to assessing the impact of issuance of the right-of-way grant.

Therefore, we conclude that Diablo was properly required to reimburse BLM in full for expected administrative and other costs that will be incurred in processing right-of-way application CA-30523 and that the application falls into Category V. To that extent, the Acting Area Manager's August 1992 decision is affirmed. In addition, with one small exception, we affirm the decision to the extent that it adopted BLM's determination of the total costs for which Diablo must reimburse BLM, and required payment therefor. To the extent that Diablo's deletion of relocating the fence affects these costs, however, the decision is set aside and the case is remanded to BLM to consider the appropriate costs as a result of this changed circumstances. Those costs shall be set forth in a subsequent BLM decision that will be subject to appeal to the Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside in part, and the case is remanded to BLM for further action consistent herewith.

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Franklin D. Arness
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge